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MICHAEL RODAK, JR.,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-677

BOARD OF EDUCATION OF THE MEMPHIS CITY SCHOOLS, *et al.*,

Petitioners,

vs.

DEBORAH A. NORTHCROSS, *et al.*

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO CERTIORARI

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No. 72-677

Board of Education of the Memphis City Schools, *et al.*,

Petitioners,

vs.

Deborah A. Northcross, *et al.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO CERTIORARI

Opinions Below

Since the filing of the Petition, the opinion of the Court of Appeals has been reported at 466 F.2d 890, and the April 20, 1972 opinion of the District Court at 341 F. Supp. 583. The unreported District Court opinion of December 10, 1971 is reprinted at pp. 1a-26a of the Appendix to the Petition.

Jurisdiction

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

Questions Presented

1. Whether Petitioners established as a factual matter that the present school segregation in Memphis is entirely unrelated to the past policies of discrimination and segregation carried out by the Board of Education. (The findings below that Petitioners had failed to do so are not clearly erroneous).

2. Whether the modest, interim desegregation steps ordered implemented by the District Court are so fiscally and educationally burdensome as to exceed the limits of practicability and feasibility enunciated in *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971). (The findings below that Plan A is within the present means of the Board of Education are not clearly erroneous, and the District Court has demonstrated its willingness to modify its Order upon a showing of actual hardship).

3. Whether the Court of Appeals erred in instructing the District Court to develop and approve a plan of complete desegregation for Memphis. (The District Court's Order left 68,699 students in virtually one-race schools because "[t]he practicalities of the existing situation in the City of Memphis limit the change in the plan of desegregation to this extent at the present time").

Statement of the Case

This matter was last before this Court in 1970, *Northcross* v. *Board of Educ. of Memphis*, 397 U.S. 232 (1970). A detailed history of the proceedings since this Court's decision is appended hereto as Appendix A, but the events may be briefly summarized as follows:

In 1971, the United States Court of Appeals for the Sixth Circuit remanded this case to the District Court

to reexamine the plan of desegregation then in operation in accordance with the principles of this Court's decisions in *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971) and *Davis* v. *Board of School Comm'rs*, 402 U.S. 33 (1971). The District Court subsequently authorized and directed representatives of the United States Department of Health, Education and Welfare to assist the school board and the Court in devising a desegregation plan for Memphis which complied with *Swann*.[1]

In conferences with the District Court and counsel for the parties, members of the team of educators designated by H.E.W. raised questions concerning the scope of the plan required in accordance with *Swann*, and the District Court scheduled an evidentiary hearing to resolve these issues, and to provide guidance for the H.E.W. team.

One issue described by the District Court's September 28, 1971 "Order Pertaining to Hearing" was as follows:

> 2. Are the one race schools, or virtual one race schools, genuinely non-discriminatory; that is, are they not the result of present or past discriminatory action on the part of the defendants or their predecessors?

Plaintiffs contended that *Swann* required desegregation of all Memphis schools unless impracticable; but the Board of Education claimed *all* of its school segregation—except that at three schools—bore no relation to the maintenance of the dual system but resulted solely from racially segregated housing patterns to which neither it nor other State agencies had contributed. Evidence at the Fall, 1971 hearing therefore did focus upon residential patterns in Memphis, and the actions of the School Board and other State

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[1] *See Carter* v. *West Feliciana Parish School Bd.*, 396 U.S. 290, 292 (1970) (Mr. Justice Harlan, concurring).

agencies which contributed to the establishment of those patterns.

At the conclusion of the hearing, the District Court ruled that the Board had failed to prove its claims:

> In regard to the over-all issue of one-race schools, this Court concludes that the proof establishes that the defendant Board and its predecessors have played a significant role in establishment of the present large number of one-race schools which have resulted from discrimination by numerous persons and groups.

The Court set forth criteria to be employed in the preparation of two alternative plans (subsequently identified as Plan A and Plan B) by the HEW-designated team.

When the HEW team withdrew from the case, the District Court required the school board to assume responsibility for the submission of the plans; a hearing on their sufficiency and on an alternate plan presented by the plaintiffs was conducted in the Spring of 1972, resulting in the April 20, 1972 district court decision requiring implementation of "Plan A" (which achieves less desegregation than "Plan B" and far less than plaintiffs' plan) for the 1972-73 school year. Because that order was stayed by the Court of Appeals between June 2 and the date its decision was rendered, August 29, 1972, the effective date of implementation for Plan A was advanced to the second semester of the current school year.[2]

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[2] In addition, following a hearing in the Fall of 1972, the District Court further postponed implementation of the high school portion of Plan A until the 1973-74 school year in response to Petitioners' contentions that midyear implementation on the high school level was impracticable.

Reasons Why the Writ Should Be Denied

During this Term, this Court has already considered and denied petitions for review of school desegregation orders filed by at least eight school boards,[3] but probably none had as little merit as this one. Petitioners seek to convey to the Court the completely erroneous impression (1) that the District Court required desegregation of a school system about which there was no proof except that it had racially segregated housing; (2) that the District Court recklessly overrode compelling evidence that enormous expense and undisputed educational disruption would result from the desegregation it was requiring; and finally, (3) that the Court of Appeals acted on its own initiative to compel further "racial balancing" in the future even though the District Court viewed its Order as accomplishing a complete discharge of the school authorities' constitutional obligations. Any resemblance between Petitioners' description of the case and what actually transpired below seems completely fortuitous.

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[3] *Washington Parish School Bd.* v. *Moses*, 41 U.S.L.W. 3274 (Nov. 13, 1972); *Jefferson Parish School Bd.* v. *Dandridge*, 41 U.S.L.W. 3253 (Nov. 6, 1972); *County Bd. of Educ.* v. *Acree*, 41 U.S.L.W. 3274 (Nov. 13, 1972); *Colquitt County Bd. of Educ.* v. *Harrington*, 41 U.S.L.W. 3207 (Oct. 16, 1972); *Board of Educ.* v. *Brown*, 41 U.S.L.W. 3253 (Nov. 6, 1972); *Potts* v. *Flax*, 41 U.S.L.W. 3274 (Nov. 13, 1972); *Metropolitan County Bd. of Educ.* v. *Kelley*, 41 U.S.L.W. 3254 (Nov. 6, 1972); *Board of Educ.* v. *Dowell*, 41 U.S.L.W. 3313 (Dec. 4, 1972).

I

The Desegregation Orders of the Courts Below Are Grounded Upon Findings of Discrimination by School Authorities.

Petitioners say that

> It is undisputed that existing racial imbalance in pupil assignments in this school system is caused solely be the impact of housing patterns in the City of Memphis. (p. 9)

Nothing could be further from the truth. The proof below demonstrated abundantly, to the satisfaction of the District Court and the Court of Appeals, that school segregation in Memphis today is the result of a continuous course of conduct and discrimination by the Memphis school authorities in every area of their responsibility: school construction, pupil and faculty assignment, transportation, etc. Throughout the litigation, however, Petitioners have consistently shadow-boxed a legal theory never propounded by the plaintiffs or the District Court and irrelevant to this lawsuit—that school desegregation is required in Memphis only because there is housing segregation for which the entire or major share of blame is the School Board's.

Swann explicitly eschewed any such theory and we did not urge it below, nor do we in this Court. The District Court did not purport to base either its December 10, 1971 or April 20, 1972 opinions upon such a standard. The issue described by that Court's September 28, 1971 *Order Pertaining to Hearing* was as follows:

> 2. Are the one race schools, or virtual one race schools, genuinely non-discriminatory; that is, are they not the

> result of present or past discriminatory action on the part of the defendants or their predecessors?

It was the School Board's defensive claim on this issue, *viz.*, that its schools are segregated only because of racially separate housing patterns, which brought the subject of residential segregation into this lawsuit. It was the Board's defensive claim that it contributed in no way to either existing school segregation or existing housing segregation in Memphis which led plaintiffs to demonstrate the effect of school system practices upon housing segregation—although we took the position below that in Memphis, the result of that particular inquiry is irrelevant since, whatever the degree to which actions of the school board may have contributed to housing segregation, it is very clear on this record that Memphis school assignments were long made on the basis of race, and the case is therefore governed by the remedial principles of *Swann*.

The Petition claims that since the testimony showed similarities between racial residential segregation patterns in Memphis and other cities,

> [t]he case at bar is thus distinguishable from the *Swann* case, where it was found that previous decisions relating to the location of schools had presented the Court with a "loaded game board." (p. 10)

But the long-standing maintenance of segregated schools in all of Tennessee, including Memphis, mandated by state constitutional and statutory prohibitions (*see Kelley* v. *Metropolitan County Bd. of Educ.*, 463 F.2d 732 (6th Cir. 1972), as well as Petitioners' continuing discriminatory school site location and construction practices (*see infra*) clearly distinguish this case from one in which virtually unaltered, neutral, non-racial single geographic attendance

zones have always been used for student assignment. *Compare Deal* v. *Cincinnati Bd. of Educ.*, 369 F.2d 55 (6th Cir. 1966), *cert. denied*, 389 U.S. 846 (1967) *with United States* v. *Board of Educ.*, 429 F.2d 1253 (10th Cir. 1970).[4]

The findings in the December 10, 1971 District Court opinion that the school system had contributed to, aggravated and accommodated racially segregated housing patterns in Memphis are supported by substantial evidence and are not clearly erroneous. *Davis* v. *School Dist. of Pontiac*, 443 F.2d 573 (6th Cir.), *cert. denied*, 404 U.S. 913 (1971). Since Petitioners completely ignore the evidence in the case, we shall describe some of it at length to illustrate the strong support in the record for the District Court's holdings.

Petitioners did not challenge the district court's findings that the segregated *housing patterns* in Memphis are the direct product of racial discrimination. Indeed, no other findings would have been possible on the record developed below (I Tr. 815-20, 836-41, 843-65, 866-69, 872-74, 889-93, 896-98, 906-12, 923, 924-25, 939-40, 943, 958-66, 1018-21, 1100-05, 1109-21, 1244-51, 1257, 1531-32, 1535-36, 1566-92, 1619-20;

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[4] In *Swann*, 402 U.S. at 23, this Court said:

> We do not reach in this case the question whether a showing that school segregation is a consequence of other types of state action, without *any* discriminatory action by the school authorities, is a constitutional violation requiring remedial action by a school desegregation decree. (emphasis added)

Although there was considerable evidence of housing segregation resulting from discrimination accepted by the lower courts, *see Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 300 F. Supp. 1358, 1365-66, 1369 (W.D.N.C. 1969), 431 F.2d 138, 141 (4th Cir. 1970), this Court did not rely upon this evidence because it found relief required by the failure to dismantle the dual school system, and it reserved the question. Petitioners' approach to the issue would turn the reserved question on its head by excusing even gross discrimination unless the entire responsibility for all housing segregation is shown to be the school authorities'.

4/1/70 Tr. 1010-13, 1117-20; I XX 30A, 30B, 30C, 31A-F, 33A-C, 35, 36, 68, 69, 69A, 70, 71, 72, 73, 74, 76, 77, 78, 82).[5] The District Court also found that the Board "accommodated the white housing discrimination" by its construction,[6] zoning, busing and pupil assignment policies.

The construction policies followed by the Board in annexed areas are typical. Prior to the annexations, the Shelby County Board of Education provided transportation by bus to all pupils in each area living more than 1½ miles from their assigned schools (I Tr. 801-02). Rather than continue the busing, however, Petitioners elected, notwithstanding the enormous cost involved and their post-*Brown* affirmative obligation to desegregate, to construct new schools and additions to existing schools. Between 1957 and 1970, the Board expended $38 million for mostly segregated schools in annexed areas. Since 1954 the system has constructed 76 new facilities, of which only four opened with racial minorities of more than 10%: Airways Jr. (10.1% black), Chickasaw Jr. 85.5% black), Fairley High (16.7% black), Northside High (79.9% black). (See I Tr. 998-99). Plaintiffs' educational expert concluded that the pattern of school construction since 1954

[5] Citations are to the original record on appeal, which was considered without a printed Appendix. Transcripts of the various hearings in this cause are referenced in the following manner: "I Tr. ——" refers to the transcript of the hearing commencing on November 15, 1971; "II Tr. ——" refers to the March 28, 1972 hearing; transcripts of all other hearings and conferences will be referenced by the date on which the hearing or conference began—*e.g.*, "4/1/70 Tr. ——." (The transcript of each separate hearing or conference is paginated consecutively rather than by volume). Exhibits will be designated in a similar manner, indicated by "X"—*e.g.*, "I X 99," "4/1/70 X 99."

[6] The Superintendent admitted that the location of schools as of 1954 had made desegregation more difficult (I Tr. 692-93). And the Board's post-*Brown* construction practices have followed the pre-*Brown* pattern (2/6/69 Tr. 36-27) (See text *infra*).

has had the clear effect of perpetuating school segregation (I Tr. 1317-26, 1300-02; I XX 86A, 86B, 86C [school construction overlays]; I XX 52A, 52B, 52C, 52D [racial census maps for 1950, 1960, 1967 and 1970]). I X 37A contains the Board's 1959-60-61 Building Program which is broken down into a "White" program (total cost: $8,531,219) and a "Negro" program (total cost: $5,773,532).

Related to the segregation-oriented construction program just described were the Board's attendance zoning practices. Prior to initiation of this lawsuit, the Board had maintained the state-mandated dual system of pupil assignment by means of separate, overlapping attendance zones for the black and white schools. Under a stairstep plan the Board finally eliminated the dual high school zones effective with the commencement of the 1966-67 school year (I X 1049-62, 1286-87). As was demonstrated to the District Court with the use of zone line overlays and maps reflecting the racial distribution of the Memphis population according to the 1950, 1960, 1967 and 1970 U.S. Census compilations, the dual overlapping attendance zone system, coupled with school construction practices, played a significant role in determining housing choices (I Tr. 1021-37, 1326-38, 1381-85, 1451-57, 1465-70; I XX 47B, 48C, 83, 83A, 84, 84A).

Of even greater significance to the continued existence of the dual system were the new zone lines drawn by Petitioners upon elimination of dual zones. Under the dual zone operation the zones were quite large; often black attendance areas were so large as to encompass within their boundaries six or more white attendance areas of the same grade level, and the same was true of white zones in relation to black attendance areas (I Tr. 1021-37). The dual zones were eliminated by creating single zones for each school in the system, and it was in this process that Petitioners carried the dual system forward into the pur-

ported unitary system: the single zone lines, almost without exception, were drawn by contracting the former black and white zones to conform almost precisely with residential segregation lines, thereby continuing to exclude whites from the black schools and blacks from the white schools (I Tr. 1390-1402, 1410-11, 1458-63, 1471-76, 1049-62; I X 49B, 50B, 51B). Petitioners conceded that they have not drawn zone lines to maximize desegregation (I Tr. 214-15, 739); the 1966 Desegregation Plan (I X 38C) under which most zones were drawn made no mention of doing so.

Over the years the Board worked closely with the Memphis Housing Authority (I Tr. 927-29), which operated public housing projects under an overt policy of segregation until 1965, with only ineffective policy modifications since then (I. Tr. 909-12). One example should suffice. Hurt Village was one of the white-only projects built and operated by MHA. The white school (Pope) which served Hurt Village, however, was not as close and convenient as a nearby black school (Grant). In 1960 the Board, in order to accommodate the whites in Hurt Village, reversed the racial designations of the two schools (and exchanged their names as well), so that overnight the formerly white-only school took on the name and function of the formerly black-only school and *vice versa* (I. Tr. 271-78, 906-09, 1401-02).

Every witness in this case who was questioned on the subject conceded that the racial composition of schools and school locations and attendance policies *do* have an effect on individual housing choices (I. Tr. 442, 952-54, 1101-02, 1105-09, 1498-1501, 1529-31, 1612-13; 4/1/70 Tr. 156, 158, 848-60, 868-69, 873, 877).

Thus, the District Court correctly concluded that Petitioners had failed to carry their burden of showing that they were in no way entangled in racially segregated housing patterns and practices in Memphis. But even a con-

trary determination would have controlled only a threshold issue, leaving for further determination the question whether Petitioners' incorporation of Memphis housing segregation through school zoning was in any sense neutral, fortuitous and innocent.[7] Since that is emphatically not the case, the District Court was right in requiring the design of desegregation plans affecting every Memphis school.

II

The Desegregation Order of the District Court Will Neither Inordinately Burden the School District Nor Interfere With the Educational Process.

Petitioners argue that the District Court's judgment exceeds the *Swann* guidelines of practicality and feasibility and that, in any event, "busing" is educationally unsound and should be rejected as a desegregation tool.

The latter contention invites the Court to reconsider its decision in *Swann* without setting forth any reason for so doing except a recent (and controversial) popular journal article which purportedly establishes the educational harm of pupil transportation.[8] Furthermore, just as this Court

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[7] Petitioners apparently agree with the District Court that "[t]he proof unquestionably establishes that the one-race schools do follow racial housing patterns" (Petition, p. 9). Thus, Petitioners concede that they have, by their construction, attendance and zoning policies and practices, incorporated the racial discrimination in housing into the school system. *See Brewer* v. *School Bd. of Norfolk*, 397 F.2d 37 (4th Cir. 1968) (cited with approval in *Swann*, 402 U.S. at 21); *Davis* v. *School Dist. of Pontiac, supra; Sloan* v. *Tenth School Dist. of Wilson County*, 433 F.2d 587, 589 (6th Cir. 1970) (citing *Brewer*); *United States* v. *Board of Educ., supra.*

[8] The relevance of that study to Memphis is in doubt, as its author suggested. See Ptn. Appendix, p. 37e, f.n. 1; *id.* at p. 8e.

recognized in *Swann* that transportation was an accepted educational tool, so Petitioners are hard pressed to maintain their position: although Memphis never operated a system-wide transportation network, the record demonstrates that a considerable amount of busing for segregation took place in Memphis—particularly in connection with annexations.[9]

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[9] Some examples:

In a 1950 annexation, Memphis expanded to the east and southeast, taking in the following schools operated by the County Board (under the dual system): Douglas (black), St. Stephens (black), White Station (white), Patterson (black), South Park (white), Maple (white), Gragg (white), Grahamwood (white), Cane Creek (now Dunn) (black). (I Tr. 769-76; I XX 10 (map), 13). Sherwood (white) and another school (probably Charjean, see I X 13 at 2), although not operated by the County Board were built by them pursuant to a joint agreement with Petitioners (I Tr. 777). The black schools in this annexed area were elementary schools; black secondary students in the area were bused, depending on where they lived, to black high schools which remained in the county: Neshoba (grades 1-10) at Germantown in the eastern part of the county, and Geeter (grades 1-12) in the south. Those black students who went to Neshoba through grade 10 were assigned to Woodstock, in the northern portion of the county, for grades 11 and 12. For these students no bus transportation was provided; they travelled to Woodstock on Sunday afternoon and lived in a dormitory until Friday night. (I Tr. 772-73). (Prior to 1947 or 1948, no transportation at all was provided for black students, I Tr. 773-74). The white students in this area also received bus transportation (I Tr. 775-76).

A 1958 annexation brought the Frayser area into the city, thereby expanding Memphis considerably to the north and adding 6,011 students to the system. There were no black schools in this area; black students had been bused to Woodstock (north of the Frayser area) (I Tr. 779, 781). Several schools were built in the Frayser area under a joint building program with Petitioners (I Tr. 779-81) while the white students in the area were bused to white schools (I Tr. 781-82). After the annexation, Petitioners contracted with the County Board to continue busing black students in the Frayser area to the County "black" school, Woodstock (Dec. 10 Op. at 11; I Tr. 1348-49, 1645).

Whatever may be the responsibility of school authorities generally for the acts of other public agencies, *see Deal* v. *Cincinnati Bd. of Educ., supra*, the Memphis educational authorities are clearly linked to the segregatory busing practices of the Shelby County system not only because they are the immediate successor to the County Board but also by their affirmative participation in the continuation of such programs after annexation. Thus Petitioners are hardly in a position to maintain that they have never "bused for segregation" or that many of their students are not now attending segregated schools as the result of past segregatory busing.

Even were this not the case, Memphis would gain no immunity from being required to use "any of the tools of modern life in carrying out [the] constitutional mandate," *Kelley, supra*, including busing. While the costs of implementing desegregation may be substanial (although not in comparison to the Board's expenditures for segregated construction), those expenditures must be made. *Brewer* v. *School Bd. of Norfolk*, 456 F.2d 943 (4th Cir.), *cert. de-*

In 1965 Memphis expanded to the southeast, annexing the Oakhaven-Parkway Village area and 6,051 public school students. All the schools in this area were white, except Getwell; all students were provided transportation with the black high school students being bused to Capleville School (still in the county) and whites to Oakhaven (I Tr. 784-87).

In these and other annexed areas the Petitioners and the Shelby County Board have historically cooperated in such joint ventures as building programs and educational services (one system providing education for pupils residing in the other system's jurisdiction). (See 2/6/69 Tr. 401). Although the Memphis Board has consistently chosen to construct new schools and additions rather than continue transportation (I Tr. 305-09), and although it has begun construction programs in the annexed areas even before the effective date of the annexations (I Tr. 309-10, 436, 452-53), the Board has had to provide temporary transportation services to maintain segregation pending completion of new schools after every annexation (I Tr. 763, 433, 435, 436, 736-38).

nied, 406 U.S. 905 (1972); *United States* v. *Greenwood Municipal Separate School Dist.*, 460 F.2d 1205 (5th Cir. 1972).

The logistical feasibility of pupil transportation in Memphis is illustrated by the fact that existing Memphis Transit Authority routes serve, within two blocks, every elementary school in the Memphis system (II Tr. 760-62). And the times and distances between schools, based on existing MTA runs, are quite reasonable (4/1/70 Tr. 1125 et seq.). In the words of the Board's attorney: "The service is there to transfer from any school in any part of the city to any other part of the city and get there within a reasonable length of time" (4/1/70 Tr. 1223-24).

Petitioners venture (p. 12) that implementation of Plan A "will impinge disastrously on both the finances and the curriculum of the school system," but that contention is thoroughly refuted by the record.

While the implementation of Plan A may cost from $565,000 to $700,000, it also provides counterbalancing savings: the plan permits the closing of seven elementary schools, allowing Petitioners to better utilize their facilities (as well as eliminate some overcrowding problems),[10] thereby resulting in considerable savings (II Tr. 165, 167, 172, 728-29; April 20 Op. at 16, 17; May 5 Order Denying Stay at 5); the plan eliminates the need for the construction of at least three planned new schools, resulting in a savings approaching $3,000,000—proposed new elementary school near the present Oakville school (estimated savings, $1,000,000), proposed new elementary school in Glenview

[10] I X 18 reveals 19 schools with enrollment larger than the rated maximum capacity. In the system as a whole, however, there are 33,875 net vacant pupil spaces based on rated maximum capacity, of which 41% are in 90%+ black schools and 36.5% are in 90%+ white schools (I X 57).

Park (estimated savings, $800,000), and proposed replacement of Merrill (estimated savings, probably $500,000-$800,000) (II Tr. 172-75, 265-68). The long-range economics of Plan A may be equally favorable, providing Petitioners with the means to better utilize their under-capacity facilities and to generally operate a more economically efficient school system.

The real issue was stated by the district judge during the 1971 hearing: "what are the constitutional rights of over a hundred thousand children worth?" (I Tr. 643). Surely the answer, if there is one, is greater than $700,000 in a system with an annual budget of over $98 million. *Cf. Brewer* v. *School Bd. of Norfolk, supra,* 456 F.2d at 947 n. 6; *see also, United States* v. *Greenwood, supra; Brown* v. *Board of Educ.,* 464 F.2d 382 (5th Cir.), *cert. denied,* 41 U.S.L.W. 3253 (1972).

Petitioners' remaining arguments contend that no effective desegregation should ever be ordered in Memphis because student participation in extracurricular activities or their availability for after-school employment, etc., may be affected. These considerations are characterized as features of desegregation which "impinge upon the educational process." *Swann* recognizes that the process of desegregation will result in some awkwardness and inconvenience (402 U.S. at 28) but limits those circumstances which will excuse failure to desegregate to plans under which "the time or distance of travel is so great as to either risk the health of the children or significantly impinge on the educational process." 402 U.S. at 30-31. Petitioners made no such argument but opposed any and all pupil transportation. Furthermore, not only are the transportation times proposed under Plan A well within the parameters considered reasonable in *Swann,* but many pupils will get to their new schools *with* busing under the plans faster than others who

must now either walk or furnish their own transportation! Finally, it is well within Petitioners' power to avoid some of these practical problems as, for example, by scheduling extra "late" bus runs for students participating in extracurricular activities.[11]

III

The Court of Appeals Properly Instructed the District Court to Complete the Process of Dismantling Memphis' Dual School System.

Petitioners' attempt to suggest that the Court of Appeals required further pupil busing in a school system which the District Court held would be made completely unitary under Plan A, is nothing short of duplicitous. The Petition proceeds (pp. 16-17) as though plaintiffs had not cross-appealed the adequacy of the District Court's Order, and as though the Court of Appeals acted *sua sponte*.

The language of the Court below speaks for itself (Ptn. Appendix, pp. 3c, 9c):

> In *their* appeal from the District Court's order the plaintiffs complain that the new plan adopted by the District Court does not meet the requirement of *Green* v. *County School Board of New Kent County*, 391 U.S. 430, 439 (1968), that any desegregation plan adopted be one which "promises realistically to work, *now*." (emphasis in the original).
>
> . . .
>
> Plaintiffs too have objected to the District Court's overall decision, however. They assert that the Dis-

[11] Many districts with substantial numbers of transported pupils have rescheduled extracurricular activities in the middle of the day (II Tr. 1114-16).

trict Court erred in rejecting plans which could have provided for more desegregation faster. Plaintiffs point out that the present plan will still leave 80 of Defendant's 162 schools in the one-race status at the close of the '72-'73 school year. They contest the accuracy of the District Court's finding that the more effective plans submitted to it would prove impractical. At the same time Plaintiffs raise these objections, however, they acknowledge that at this late date no more effective desegregation plan could be implemented for the beginning of the 1972-73 school year. Since they also recognize that the District Judge accepted the need for further desegregation in the future they request only that this Court direct the District Court to prepare a timetable for further desegregation. We believe such request is reasonable. It will allow the implementation of the present plan unimpeded by procedural wrangles, while providing an opportunity for the District Court to arrive at a final plan which is effective, "feasible and pedagogically sound." *See Robinson* v. *Shelby County Board of Education*, 442 F.2d 255, 258 (6th Cir. 1971) (Opinion of McCree, Judge.)

References in the opinion of the District Court suggest its view that Plan A will not create a unitary school system in Memphis. Thus, for example, the court follows its statement (Ptn. Appendix, pp. 23b-24b) that it believes "the approved plan meets the requirements of the Constitution" with its expressed hope that it "*will afford* the defendants a means of *ultimately achieving* the goal of *a desegregated school system*. . . ." (emphasis supplied). The court concludes (*ibid.*):

> Upon consideration of all the plans, the proof offered at the hearing and the entire record in the cause, this

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> Court is of the opinion that Plan A, with certain modifications, meets the criteria established and required by the Constitution of the United States as interpreted by the authorities. The practicalities of the existing situation in the City of Memphis limit the change in the plan of desegregation to this extent at the present time. Plan A will afford the defendant Board an opportunity to implement a system of transportation for its students, and thereby afford the defendants with an opportunity to observe the best ways and means for implementing further desegregation in the future. Plan A further meets the test of practicalities with regard to time of implementation and costs in the light of the circumstances existing at this time.

A cursory study of the results which are anticipated under Plan A reveals its total inadequacy. Appendix B to this Brief shows past, present and projected student enrollment in Memphis schools which were completely segregated one-race schools in 1969-70.[12] The table demonstrates that as to these schools, which even the Memphis Board concedes were segregated schools in 1969-70, there had been very little actual desegregation by 1971-72. Each of these 56 schools remained either all one-race or virtually all one-race schools in 1971-72.[13] Plan A was to have no effect whatsoever on the racial composition of 34 of these schools. At two additional schools which serve more than one grade level, only one such level would be

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[12] *See* Petition for Writ of Certiorari, *Northcross* v. *Board of Educ.*, 397 U.S. 232 (1970) [No. 1136, O.T. 1969], pp. 24a-31a.

[13] The token desegregation which did occur in some schools is largely accounted for by the faculty desegregation process and the privilege afforded teachers to enroll their children in the schools in which they taught.

affected. Even the remaining schools, at which Plan A would result in a different student population in 1973-74, can by no means be said to all be effectively desegregated.[14]

The exhibits demonstrated that under Plan A, 80 schools would have student bodies more than 90% of one race or another, and that 68,699 (or 47.4%) of Memphis students would remain in such schools.

We think it is clear that the District Court's action approving such a plan could only be sustained, if at all, as an interim measure adopted because of overbearing practical considerations, and that the Court of Appeals was unquestionably correct and justified in requiring completion of desegregation in Memphis *forthwith*.

[14] Of the 34 one-race schools which would be completely unaffected by Plan A, 23 were virtually all-black schools in 1971-72 and enrolled 24,388 black students, or 32.6% of the black pupils in the system (other than kindergarten and special education students, whose assignments will not be affected by Plan A). An additional 1112 black students were in grade levels of the two schools which were virtually all-black in 1971-72, only some of whose grade levels would be reached by Plan A. Thus 25,500 (34.1%) of the black students attended virtually all-black schools or grade levels in 1969-70 ar d 1971-72 which would not be affected at all by Plan A. Eleven of the unaffected schools were all-white in 1969-70 and virtually all-white in 1971-72. These 11 schools in 1971-72 enrolled 10,949 white students, or 16.9% of all whites in the system (exclusive of kindergarten and special education pupils).

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CONCLUSION

WHEREFORE, for the foregoing reasons, Respondents respectfully pray that the Writ be denied, and that pursuant to §718 of the Education Amendments of 1972, the District Court be instructed to award counsel for Respondents a reasonable attorneys' fee for services in connection with the proceedings before this Court.

Respectfully submitted,

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APPENDIX

APPENDIX A

Recent History of *Northcross* v. *Board of Educ. of the Memphis City Schools*

On remand from this Court's decision in *Northcross* v. *Board of Educ. of Memphis,* 397 U.S. 232 (1970), the district court entered an order setting a hearing on April 1, 1970 to consider seven issues: (1) whether the defendant Board was then operating a unitary system; (2) whether the court should require defendants to adopt a new or modified plan utilizing any one or more, or a combination of such methods as rezoning, pairing, contiguous zones or cross-transportation of pupils between zones, and if so, to what extent; (3) whether the court should eliminate the free transfer policy; (4) whether the court should require a faculty desegregation ratio which, within a margin of 10%, would reflect the system-wide racial ratio of the faculty; (5) whether the court should enjoin further construction by the defendants pending adoption of a new plan; (6) whether a new plan should be requested from an expert from outside the system; and (7) when should any relief granted by the Court be placed into effect.

The hearing commenced on April 1, 1970 and lasted seven and one-half trial days. On May 1, 1970 the district court entered its opinion (312 F. Supp. 1150), and on May 4, 1970 its implementing order. The court held that the defendants were "not maintaining a unitary system," largely because of the free transfer policy and continued faculty segregation, but the court rejected pairing and transportation as desegregation techniques for Memphis. The court altered the free transfer policy so that majority-to-minority transfers would, with two limited exceptions, be prohibited; majority-to-majority and minority-to-minority transfers

would continue to be allowed. In the area of faculty desegregation, the district court held, in effect, that defendants had not complied in good faith with the court's May, 1969 faculty desegregation order, and the court therefore ordered the defendants to seek the assistance of the Title IV Educational Opportunities Planning Center at the University of Tennessee in preparing for further faculty desegregation. The Title IV Center subsequently filed a faculty desegregation plan, the Board filed a counterproposal, and the court conducted a hearing thereon. On July 21, 1970, the district court entered an order essentially approving the Title IV Center faculty plan and requiring that by the beginning of the 1971-72 school year the white-black ratio of each school's faculty should be within 10% of the system-wide white-black faculty ratio.[1]

Plaintiffs appealed from the orders of the district court,[2] and oral argument was held in the court of appeals on February 11, 1971. After oral argument, but before decision of the appeal, defendants filed in the district court a notice of intent to acquire sites and construct two new schools in the southwestern part of the system, to which plaintiffs filed objections. The district court conducted, on February 19, 1971, a hearing on plaintiffs' objections to the proposed site acquisition and construction, and orally

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[1] The district court thus allowed defendants two school years within which to complete faculty desegregation requirements, although the Title IV Center had noted that Administrative policy and the law (*Singleton* v. *Jackson Municipal Separate School Dist.*, 419 F.2d 1211 (5th Cir. 1969), required immediate completion of the faculty desegregation process.

[2] Defendants noticed an appeal from the faculty desegregation order of July 21, 1970, but the appeal was never perfected (although the court of appeals apparently considered the Board's cross-appeal to be viable at the time of the June 7, 1971 remand opinion, 444 F.2d 1179).

overruled plaintiffs' objections at the conclusion of the hearing. This ruling was incorporated in a formal order and plaintiffs' application for an injunction pending appeal was denied by order of the same date.

Plaintiffs then moved in the court of appeals for an injunction restraining the proposed site acquisition pending appeal. On March 24, 1971, the court of appeals, without the benefit of oral arguments or briefs, entered a *per curiam* opinion denying the motion for injunction pending appeal and affirming on the merits the district court's approval of the site acquisition and construction proposals. Plaintiffs thereupon filed an application for rehearing *en banc* on April 5, 1971.

On June 7, 1971, the court of appeals remanded the case to the district court for reconsideration in light of this Court's April 20, 1971 decisions in *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971) and *Davis* v. *Board of School Comm'rs.*, 402 U.S. 33 (1971), and for adoption of a new plan of desegregation. 444 F.2d 1179. By opinion of the same date the court of appeals denied plaintiffs' petition for rehearing *en banc* on the site acquisition-construction issue. 444 F.2d 1184.

On remand, the district judge, by letter dated June 10, 1971, informed counsel that he had school-age sons, one of whom was and would be in attendance in the defendant school system, and:

> If counsel for the plaintiffs or defendants or their clients are of the opinion that I should recuse myself from the case due to the fact that I have school age sons, a notice to that affect should be delivered to Lloyd Johnson, the Clerk of this Court. If the Clerk receives such a notification he, in turn, will advise me

that he has received it without disclosing which attorney delivered the notice. *I will then request the designation of another judge.* (emphasis added).

On June 11, 1971, before plaintiffs had made a final decision regarding the district judge's June 10 letter, the court held a pretrial conference at which it was agreed that, regardless of the parties' responses to the letter, the court could enter a preliminary order requiring the Board to take certain steps such as the preparation of a pupil locator map and a request for assistance from outside experts in the preparation of a constitutional plan of school operation. (6/11/71 Transcript of Pretrial Conference at pp. 52, 60). (No such order was ever entered, however.)

June 16, 1971, plaintiffs filed with the district court clerk a request for designation of a new judge to preside over the case pursuant to the district court's June 10 letter. On June 24, 1971 the district court entered an order forwarding plaintiffs' request to the chief judge of the court of appeals, with the provision that "no further proceedings will be conducted until this motion is resolved." On July 12, 1971 the Chief Judge entered an order denying the request for designation of a new judge and ordered the case tried "by the district judge to whom it is assigned," Hon. Robert M. McRae, Jr.

On July 27, 1971, the district court entered an "Order Pertaining to Assistance" authorizing the Division of Equal Educational Opportunities, U.S. Office of Education, Department of Health, Education and Welfare, to assign qualified personnel to assist defendant Board in carrying out the court of appeals' mandate of June 7, 1971. The order also directed defendants to implement a

majority-to-minority transfer plan with free transportation prior to commencement of the 1971-72 school year, but held that no further desegregation would be required by the opening of school.

On July 28, 1971, the district court denied a motion by plaintiffs for leave to employ an expert at defendants' expense for the purpose of preparing a desegregation plan for plaintiffs.

On August 11, 1971, the district court held a conference with counsel, Board personnel and the HEW-designated team, at which it was determined that the team would make a preliminary investigation of the system pursuant to the July 27 order and that the Board would begin preparation of a pupil locator map. On September 9, 1971, the district court held another conference to determine the progress of the Board and the team. The team reported that it had made a preliminary investigation but that there were several questions to which it sought answers before proceeding further. (9/9/71 Tr. 8-11). Of the seven questions proposed by the team, the court considered one of the questions—whether the team should consider the racial composition of any school as "*de facto*," which should therefore be left alone—of such consequence as to require a hearing. (9/9/71 Tr. 37-39, 44). Plaintiffs took the position that there were no real issues and that the team should be required to prepare a plan which would produce the greatest possible amount of actual desegregation, taking into account the practicalities of the situation. (9/9/71 Tr. 52). Over the objection of plaintiffs, both as to timing and the necessity for a hearing, the district court scheduled the hearing for November 15, 1971. (9/9/71 Tr. 43-44, 46). On September 14, 1971, the district court entered an order setting a hearing for November 15, 1971 "for the purposes

of determining certain factual and legal issues and providing guidance to the Board and the team."

On or about September 22, 1971, plaintiffs filed in the court of appeals a petition for a writ of mandamus or for alternative relief seeking to have the district court promptly schedule the hearing set for November 15, 1971. The court of appeals entered an order on October 26, 1971 denying the petition for a writ of mandamus or for alternative relief. (No. 71-1794, Order of October 26, 1971).

In the meantime, on September 28, 1971, the district court entered an order setting forth the issues to be determined at the hearing scheduled for November 15, 1971, and directing defendants to file "any proposed desegregation plan changes which the Board intends to recommend in view of the Court of Appeals opinion remanding this case to the Court for consideration in the light of *Swann* and *Davis*." Pursuant thereto defendants subsequently filed a document entitled "The Memphis Plan."

A pre-trial conference was conducted on November 5, 1971 and on November 8, 1971 the district court entered a pre-trial order enjoining defendants from entering into any land purchases or construction contracts with regard to notices of intent previously filed and further clarifying the matters to be considered and the procedure to be followed at the November 15 hearing. The order also defined a "virtual one-race" school as one in which the predominate race is 90% or more, which definition was to be a guideline.

Prior to the November 15 hearing a white community organization, Vollentine Evergreen Community Action Association, Inc., and certain of its members, petitioned the court for leave to intervene as *amicus curiae* and to participate in oral arguments, alleging that the petitioning organization was organized for the purpose of promoting and

maintaining a stable racially integrated residential neighborhood in an area of Memphis included in the Northside High School zone. Petitioners further alleged that they were being forced to bear an unfair and disproportionate share of the desegregation burden as a result of defendant Board's segregation policies, and requested a truly integrated high school at Northside. The petition to intervene *amicus curiae* was allowed by order entered November 15, 1971.

The November 15 hearing lasted eight trial days and the court heard closing arguments of counsel on November 26, 1971. On December 10, 1971 the district court filed its Memorandum Decision and a separate Judgment concluding that the Board had not carried its burden of proving that existing school segregation was not related to the historic operation of the system:

> In regard to the over-all issue of one-race schools, this Court concludes that the proof establishes that the defendant Board and its predecessors have played a significant role in establishment of the present large number of one-race schools which have resulted from discrimination by numerous persons and groups. Therefore, it is incumbent upon the Court to require the Board to request that the team of the Division make recommendation to the defendant Board for ways that it should amend its present plan of desegregation to the end that the Memphis schools will be in compliance with the Constitution of the United States.

(December 10 Memorandum Decision at 12). The court then set forth criteria to be utilized in the preparation of two alternative plans by the HEW-designated team. (December 10 Memorandum Decision at 16-17).

Defendants thereafter filed a motion to alter or amend the Memorandum Decision of December 10, 1971, which motion was denied by order entered on December 21, 1971.

The district court's December 10 judgment directed that "pursuant to a prior request made by the defendant Board of Education, the personnel designated by the Division of Equal Educational Opportunities of the United States Office of Education will immediately undertake to further investigate and make recommendations to the defendant Board in accordance with the Memorandum Decision of the Court." On January 6, 1972, however, the Associate Commissioner of Equal Educational Opportunity of the United States Office of Education wrote the head of the HEW-designated team placing restrictions on the activities of the team pursuant to the district court's judgment.

The district court entered an order on January 12, 1972, concluding that the "belated and unexpected change in policy and procedure [by HEW] causes the Court to conclude that neither it nor the Board can rely upon the proffered assistance of the Department of Health, Education and Welfare in carrying out the mandate of the Court of Appeals." The court therefore relieved the HEW team from further participation in the case and directed the defendant Board to comply with the judgment of December 10 and prepare the two plans directed by the court's December 10 Decision. Plaintiffs thereafter moved to amend the order of January 12, 1972 to require the Board or have the court employ outside consultants experienced in desegregation planning to prepare the two plans, and further to establish a strict timetable for the preparation thereof. The district court held a conference on plaintiff's motion on January 25, 1972 and entered an order on January 28, 1972 denying the essential elements of plaintiffs' motion. The

defendant Board then designated a team of its staff to prepare the two plans directed by the December 10 judgment; several conferences were subsequently held pertaining to the progress of preparation.[3]

On March 21, 1972 defendant Board filed a motion to delay the scheduled March 28 hearing, which motion was based on a message to Congress delivered by the President of the United States on March 17, 1972 opposing the use of transportation for the purposes of school desegregation. By order entered the same date, the district court denied defendants' motion to postpone the March 28 hearing, which began as scheduled and lasted seven trial days. On April 20, 1972, the district court issued its Memorandum Decision adopting Plan A, which had been prepared by defendant Board's staff (but to which defendant Board had objected), and directing that said plan be implemented by the beginning of the 1972-73 school year.

> Upon consideration of all the plans, the proof offered at the hearing and the entire record in the cause, this Court is of the opinion that Plan A, with certain modifications, meets the criteria established and required by the Constitution of the United States as interpreted by the authorities. The practicalities of the existing situation in the City of Memphis limit the change in the plan of desegregation to this extent at the present

[3] On March 1, 1972 plaintiffs filed a motion for a temporary restraining order or preliminary injunction to restrain defendants from enrolling any more students (resulting from a new public housing project) in the already overcrowded black Geeter school. The motion was resolved by consent decree entered on March 13, 1972 wherein defendants agreed to assign all new incoming students in the Geeter zone in grades 1-9 to the nearest school of the opposite predominate race, providing transportation where necessary.

> time. Plan A will afford the defendant Board an opportunity to implement a system of transportation for its students, and thereby afford the defendants with an opportunity to observe the best ways and means for implementing further desegregation in the future. Plan A further meets the test of practicalities with regard to time of implementation and cost in the light of the circumstances existing at this time.

(April 20, 1972 Memorandum Decision at 23). The district court entered its order on April 21, 1972.

On May 1, 1972 defendant Board filed a notice of appeal and simultaneously filed a motion to stay the district court's order.[4] Subsequently the Board, by letter, requested certain modifications of the April 21 order primarily having to do with pupil transfers. On May 5, 1972, the district court entered an order supplementing its April 20 Memorandum Decision and the order of April 21, 1972 in accordance with certain agreements reached at a post-hearing conference. On the same day, the district court entered an order denying defendant's motion for a stay pending appeal, and defendants subsequently applied to the court of appeals for a stay.

On May 22, 1972, before the court of appeals had acted on the stay application, defendant Board voted to delay entering into a pupil transportation contract for implementation of the court-ordered Plan A. Believing that the Board's action was designed to and would have the effect of frustrating compliance with the district court's order, and supported by the affidavit of one Board member, plaintiffs,

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[4] Plaintiffs noticed a cross-appeal on May 16, 1972 from the district court's failure to require completion of the desegregation process.

on May 23, 1972, moved in the district court for a judgment of contempt against defendants. The district court conducted an evidentiary hearing the same day. Defendants took the position that although their delay action might have ruled out any possibility of entering into a contract with the low bidder (a private transportation company in Kansas City, Missouri), they could contract for implementation of Plan A with the Memphis Transit Authority (the local public carrier) as late as the month of July. (5/20/72 Tr. 23-24). The district court denied the contempt motion, finding that respondents' "action did not mean that the plan could not be implemented by the coming year." (District Court's Oral Ruling, 5/22/72 Tr. 125). The court's oral ruling was formalized in an order entered June 23, 1972.

On June 2, 1972, the court of appeals stayed the district court's order pending appeal. (Misc. No. 1576). On June 6, 1972 plaintiffs filed in the court of appeals a suggestion for hearing the appeals in this case *en banc* and motion to vacate the stay order of June 2, which was denied July 5, 1972, 463 F.2d 329. The appeal was expedited for argument on July 15, 1972, and on August 29, 1972, the Court of Appeals rendered its opinion affirming the district court's desegregation order, directing completion of desegregation "in the minimum time required" and vacating the previous stay.

Appendix B

(See Opposite) ☞

P

FOR MEM

School		Kinde White	Sr. High White	Black
y				
	1969-70	---	---	---
	1971-72	---	---	---
	Plan A	---	---	---
clair				
	1969-70	25	---	---
	1971-72	25	---	---
	Plan A	No	---	---
ookmeade				
	1969-70	---	---	---
	1971-72	---	---	---
	Plan A	---	---	---
dwell				
	1969-70	---	---	---
	1971-72	0	---	---
	Plan A	No	---	---

FOLDOUTS TOO LARGE TO BE FILMED